No. 95-1248

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

SAMANTHA NEELY, by and through her parents, GEORGE and CAROL NEELY,

*Petitioners,*

*vs.*

RUTHERFORD COUNTY SCHOOLS,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether a school system is required under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, to provide a full-time nurse to provide exclusive, one to one, constant classroom care to attend to a student during school for the care and maintenance of the child's medical needs?

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## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition of the Case Below

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485. Plaintiff, Samantha Neely, a minor, brought this action pursuant to the IDEA by and through her parents, George and Carol Neely. The parties are in agreement that the child at issue is a handicapped child within the meaning of the IDEA and is entitled under the IDEA to be provided with a free, appropriate education. The central issue in this case concerns the proper interpretation of 20 U.S.C. § 1401 which provides that school systems are required to provide related services to eligible children, but not medical services. Throughout the proceedings below, petitioners maintained that the school system is required by the IDEA to provide at least a licensed practical nurse for Samantha Neely throughout each school day as a related service. Respondent contended, on the other hand, that the licensed practical nurse which the petitioners were requesting fell within the medical exclusion of 20 U.S.C. § 1401(a)(17), and that the school system accordingly was not required to provide the student with a licensed practical nurse each school day to administer constant classroom care.

The petitioners requested a due process hearing before a state administrative law judge seeking to require the school system to provide a licensed practical nurse for Samantha Neely throughout each school day. The parties agreed to an interim placement in which Samantha Neely would receive homebound instruction pending the resolution of the parents' request through the legal proceedings.

A due process hearing conducted by a state administrative law judge pursuant to the IDEA was held, and the administrative

law judge for the Tennessee Department of Education found that the school system was not required to provide a licensed practical nurse to constantly attend to the child. The administrative law judge found that the requested care was a medical service the school system was not required to provide under the IDEA. Petitioners then appealed the administrative decision to the United States District Court for the Middle District of Tennessee.

In a memorandum opinion and order entered on May 10, 1994, the district court reversed the administrative hearing officer's decision and held the school system was required to provide the licensed practical nurse being requested by Samantha Neely's parents. In so holding, the court found that Samantha Neely's health condition made it necessary for her to receive constant attention on a one to one basis by a medical professional with at least a licensed practical nurse certification in order to enable her to safely attend school. However, the district court found that such nursing care was not a medical service.

Respondent then perfected an appeal of the district court's final order to the Court of Appeals for the Sixth Circuit. In an opinion filed November 2, 1995, the Sixth Circuit reversed the district court's decision and affirmed the administrative law judge's holding for the school system. *See Neely v. Rutherford County Schools*, 68 F.3d 965 (6th Cir. 1995). The Sixth Circuit agreed with the finding of both the district court and the administrative law judge that the child required constant care from a medical professional in order for her to safely attend school in the classroom setting. The Sixth Circuit found that the classroom care being requested constituted medical services which fell into the medical service exclusion of the IDEA. Accordingly, the Sixth Circuit found the school system was not required to provide the child with a full-time medical attendant to exclusively care for her health needs in the classroom.

**B. Statement of Facts**

The child at issue is a seven-year old child in the Rutherford County school system. (Admin. TR. 14.) The child has an extremely rare condition known as Congenital Central Hypoventilation Syndrome. (Admin. TR. 15.) This condition involves a dysfunction of the brain's regulation of breathing. (Admin. TR. at 66, Admin. Rec. at 13.) This results in hypoxemia (low oxygen in the blood), hypercapnia (high carbon dioxide in the blood) and acidosis (acidity in the blood). (Plaintiff's Memorandum In Support of Reversal of Decision of Admin. Law Judge Decision at 2, part of Admin. Rec. at 13.)

In this child's particular case, she does not breathe at all when she is sleeping or unconscious for some other reason. (*Id*; Admin. TR 16.) The child can suddenly lose consciousness as a result of excessive carbon dioxide in the blood. (*Id*; Admin. TR. 66-67.) If the child suddenly loses consciousness, breathing must be restored or artificially provided within minutes to prevent brain injury. (*Id*; Admin. TR. 7, 66-69.)

The child breathes through a hole in her throat known as a stoma. The stoma was created by a medical procedure known as a tracheostomy. (Admin. TR. 16.)

The stoma does not stay open by itself. A mechanical device known as a tracheostomy tube must be inserted. (Admin. TR. 16.) This is held in place by a tracheostomy tube holder, which the child wears around her neck. (Admin. TR. 18.)

During the day, the child is capable of breathing through the tracheostomy tube. When sleeping or unconscious, she must be attached to a mechanical ventilator. (Admin. TR. 16-18.)

The tracheostomy tube consists of two parts, an outer

cannula and an inner cannula. (Admin. TR. 18.) In this child's case, the outer cannula always remains in place and different inner cannulas are used at different times. (Admin. TR. 18.) She has a fenestrated inner cannula (a cannula with a small hole) to allow air to flow over her vocal chords. (Admin. TR. 18.) When sleeping, she uses a vent-adapted inner cannula which can be directly attached to a mechanical ventilator. (Admin. TR. 18.) The inner cannulas can be exchanged without removing the outer cannula. (Admin. TR. 18.)

The child cannot remove nose, mouth, and throat secretions normally, and these secretions must be mechanically removed by suctioning (Admin. TR. 23.). Otherwise, the child could suffocate from a clogged tracheostomy tube. (Admin. TR. 21-23). A suctioning device is inserted through the stoma to remove these secretions. (Admin. TR. 23.) The child requires suctioning several times a day. (Admin. TR. at 23.) The frequency of suctioning varies on a daily basis, depending on the volume of secreting material. (Admin. TR. 23.) The child can become injured if the suctioning is done improperly. (Admin. TR. at 24.) Injury can occur to the child if excessive pressure is used in the suctioning process or if the suctioning catheter is allowed to scratch the trachea wall. (Admin. TR. at 24.)

For the child to attend school, she needs to be carefully suctioned several times a day. (Admin. Rec. at 14). She also needs to be closely observed to make sure that she doesn't lose consciousness. (Admin. TR. at 24-25.) She needs someone who can reinsert her tracheostomy tube if it falls out or is pulled out. (Admin. TR. at 20.) Finally, she needs someone who can do what is necessary in an emergency situation. If she loses consciousness and stops breathing, the individual responsible will need to ventilate the child within minutes with a mechanical device known as an ambu bag to avoid serious injury. (Admin. TR. 66-67.) This child would also need to receive supplemental oxygen. *Id.*

If the child stops breathing there is no margin for error. Unless breathing is restored almost immediately, she will die. (Admin. TR. 68-69 and Admin. Rec. at 14-15.)

During the 1992-93 school year, the child was evaluated by the Comprehensive Development Center at Vanderbilt. The report included the following recommendation: "Of great concern are Samantha's medical needs in the school setting . . . [I]t is recommended that an L.P.N. or an R.N. be trained in caring for her unique medical needs . . . Bimonthly rechecks on the L.P.N. or R.N.'s ability to manage equipment and procedures is recommended." (Admin. Hearing EX2; at Admin. Rec. at 79).

For the entire 1992 - 1993 school year, the child attended a Rutherford County school. (Admin. TR. at 31.) Throughout the year, one of the child's parents was present at school at all times when she was there with the occasional exception of running an errand a few minutes from school. (Admin. TR. at 31-32.) The parents had received extensive training necessary to care for the child's medical needs at home. (Admin. TR. at 45). Even then, the parents could be reached by a portable telephone. (Admin. TR. 31-32.) At the end of the 1992-1993 school year, the child's parents notified the school that they would not be able to attend school every day with the child during the next school year, 1993-1994. (Affidavit of George Neely, Supplementing Testimony of Admin. Hearing.) They asked the school to make appropriate arrangements for addressing the child's tracheostomy care for the 1993-1994 school year. (Affidavit of George Neely Supplementing Testimony of Admin. Hearing.)

The school system agreed to attempt to locate an educational assistant with at least licensed practical nurse training to serve all the students in a classroom with the child at issue. (Admin. Hearing EX1, at Admin. Rec. at 57). There was never any intention that the educational assistant would be

assigned to the child at issue to the exclusion of the other children in the class. (Plaintiff's Memorandum in Support of Reversal of Decision of Admin. Law Judge at 5).

The school system advertised for the position, but was unable to find an educational assistant with licensed practical nurse training to hire for the child's classroom. It also became apparent to the school system that the child required a full-time nurse to care solely for her needs if she was to attend school in the classroom setting. (Admin. TR. 52, 54-56.). The parents objected to the administration of tracheostomy care by anyone other than at least a licensed practical nurse. (Admin. TR. 40-41.) The parents also demanded that the nurse be provided at school system expense to care for their child at school.

Despite subsequent meetings, the school system and the parents were unable to resolve their dispute. (Admin. TR. 40-41.) The school system contended it was not required under the Individuals with Disabilities Education Act to hire a licensed practical nurse to exclusively care for the child because the care being requested was medical in nature, and fell within the IDEA's medical exclusion. The parents of the child contended otherwise. The parties agreed to submit the issue to a special education hearing officer for determination. (Admin. TR. 40-41; Admin. Rec. at 16.) The parties further agreed on an interim placement in which the child would receive homebound instruction from the school system pending the resolution of the question by the hearing officer. (*See* Admin. Rec. at 16). The school system has provided homebound instruction to the child since then, and is continuing to provide an educational program to the child in the homebound setting.

## SUMMARY OF ARGUMENT

I. The Sixth Circuit ruling under the facts of this case that a

school system is not required to hire a full-time licensed practical nurse to provide exclusive one-to-one care to the student at issue is consistent with the well established line of cases addressing the issue.

II. Contrary to the argument of petitioners, the Sixth Circuit's decision is not in direct conflict with this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

III. This case does not present an important federal question concerning the IDEA.

## REASONS FOR DENYING THE WRIT

### I.

### THE SIXTH CIRCUIT RULING UNDER THE FACTS OF THIS CASE THAT A SCHOOL SYSTEM IS NOT REQUIRED TO HIRE A FULL-TIME LICENSED PRACTICAL NURSE TO PROVIDE EXCLUSIVE ONE-TO-ONE CARE TO THE STUDENT AT ISSUE IS CONSISTENT WITH THE WELL ESTABLISHED LINE OF CASES ADDRESSING THE ISSUE.

The Sixth Circuit's holding that the IDEA does not require a school system to provide constant, one-one-one nursing care in the classroom is consistent with the overwhelming majority of cases addressing the issue. *See Granite School District v. Shannon M.*, 787 F. Supp. 1020 (D. Utah, 1992); *Detsel v. Board of Education of Auburn*, 637 F. Supp. 1022 (N.D.N.Y., 1986), *aff'd*, 820 F.2d 587 (2d Cir. 1987), *cert denied*, 484 U.S. 981 (1987); *Clovis Unified School District v. Calif. Office of Admin. Hearings*, 903 F.2d 635, 642 (9th Cir. 1990); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983); *Bevin*

*v. Wright*, 666 F. Supp 71 (W.D. Penn. 1987); *Max M. v. Thompson*, 592 F. Supp. 1437, 1444 (N.D. Ill. 1984). *But see Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824, 828 (E.D. Mich. 1989). The central issue presented by this case is whether the IDEA requires a school system to provide an individual child with a full-time, licensed medical professional to administer constant, one-on-one tracheostomy care and nursing services in the classroom under the unique facts of the case.

The IDEA requires school systems to provide handicapped students with "related services" to the provision of a free, appropriate public education. 20 U.S.C. § 1401(a)(18). "Related Services" are defined by the code as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, *except that such medical services shall be for diagnostic and evaluation purposes only as may be required to assist the handicapped child to benefit from special education*, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. §1401(a)(17)(emphasis added).

Thus, the IDEA itself provides school systems are only required to provide medical services if the services are for diagnostic or evaluative purposes. The petitioners in this case do not contend the care they are seeking is for diagnostic or evaluative purposes.

The overwhelming majority of courts examining similar cases have found that a school system is not required by the IDEA to provide constant, classroom nursing care on an exclusive, one-to-one basis. *See Granite School District v. Shannon M.*, 787 F. Supp. 1020 (D. Utah, 1992); *Detsel v. Board of Education of Auburn*, 637 F. Supp. 1022 (N.D.N.Y., 1986), *aff'd*, 820 F.2d 587 (2d Cir. 1987), *cert denied*, 484 U.S. 981 (1987); *Clovis Unified School District v. Calif. Office of Admin. Hearings*, 903 F.2d 635, 642 (9th Cir. 1990); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983); *Bevin v. Wright*, 666 F. Supp 71 (W.D. Penn. 1987); *Max M. v. Thompson*, 592 F. Supp. 1437, 1444 (N.D. Ill. 1984). *But see Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824,828 (E.D. Mich. 1989). Accordingly, the Sixth Circuit's ruling is consistent with the clearly established majority rule concerning this issue.

## II.

## CONTRARY TO THE ARGUMENT OF PETITIONERS, THE SIXTH CIRCUIT'S DECISION IS NOT IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *IRVING INDEPENDENT SCHOOL DISTRICT V. TATRO*, 468 U.S. 883 (1984).

Contrary to the petitioners' assertion in their petition for writ, *Irving Independent School District v. Tatro*, 486 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984) does not clearly and unequivocally hold that the IDEA's medical services exclusion is limited to services performed by a physician. The particular procedure at issue in *Tatro* was a relatively simple procedure known as clean intermittent catheterization (CIC) *Id.* at 885. The court noted that although Congress devoted little discussion to the "medical service" exclusion of the IDEA, it could reasonably be concluded that it was designed to spare schools from an obligation to provide a service that might well prove

unduly expensive and beyond their range of competence. *Id.* at 892. In determining whether CIC fell within the medical exclusion of the IDEA, the court noted that CIC could be performed by a trained layperson. *Id.* at 893. The court had earlier noted that the procedure was a simple one which could be performed by a layperson in a few minutes with less than one hours training, and the student would soon be able to perform the procedure for herself. *Id.* at 885. The court found that the provision of CIC was similar to the care the school was already providing to non-handicapped children. *Id.* at 893. The court commented, "It would be strange indeed if Congress in attempting to extend special services to handicapped children were unwilling to guarantee them services of a kind that are routinely provided to the non-handicapped." *Id.* at 893-894. The court further noted that the parents in *Tatro* were not asking the school system to provide equipment. *Id.* at 895. After commenting on these factors, the court found that CIC did not fall into the medical exclusion of the IDEA, and thus was a related service the school system was required to provide.

Based on the court's consideration in *Tatro* of the specific level of care at issue, the time required to administer the care, and the fact that the care could be provided by a layperson with minimal training, the majority of lower courts have read *Tatro* to hold that in order to determine whether a specific service falls within the medical exclusion of the IDEA, the court must examine the nature and extent of the specific service and the burden on the school system. *See Clovis*, 903 F.2d at 642; *Shannon M.*, 787 F. Supp. at 1026; *Bevin H.*, 666 F. Supp. at 1027. The overwhelming majority of courts have specifically rejected petitioners' argument that *Tatro* establishes a bright-line physician based test by which all health services performed by someone other than a licensed physician are related services under the IDEA regardless of the amount of care, expense or burden on the school system and, ultimately, on other school

children. *Id. Shannon M.*, 787 F. Supp. at 1027. *Tatro* holds only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded. *E.g. Shannon M.*, 787 F. Supp. at 1027.

It should also be noted that *Tatro* is premised on a relatively minimal level of care. The care required in the case at hand is far more extensive than the level of care at issue in *Tatro*. Unlike *Tatro*, the care required by the student at issue in this case is constant, extensive, and cannot be provided by a layperson. State law requires the tracheostomy care at issue be provided only by a physician, registered nurse, licensed practical nurse or respiratory therapist. Tenn. Code Ann. § 63-6-402, 63-6-410. The student would require continuous monitoring and care from a licensed medical professional for her to safely attend school. The services she requires must be quickly and properly administered, otherwise the child is subject to serious injury or death. The high level of care at issue in this case is far different than the minimal level of care at issue in *Tatro*. *Tatro* does not address constant, one-on-one nursing services. Accordingly, the Sixth Circuit's opinion does not conflict with the *Tatro* decision.

Petitioners' statement that the Sixth Circuit's decision utilizes cost alone to determine whether or not a service falls within the medical exclusion is incorrect. Quite to the contrary, the Sixth Circuit found that the undue burden on the school system "derives from the nature of the care involved rather than the salary of the person performing it." *See Neely*, 68 F.3d at p. 12 of the Opinion.

## III.

## THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION CONCERNING THE IDEA.

The Sixth Circuit's ruling in this case does not present a novel federal question or extend beyond the specific and unique facts of this case. Appellants' assertion to the contrary is erroneous. First, the issue concerning constant, classroom nursing care has already been addressed in the well established line of cases cited above. The Sixth Circuit's decision is consistent with those decisions.

Secondly, cases under the IDEA turn on their own unique and specific facts. Appellants' contention that the Sixth Circuit's decision in this case constitutes the extension of a broad based medical exclusion that threatens the rights of thousands of children is simply erroneous and gross exaggeration. IDEA cases are examined on a case-by-case basis. The Sixth Circuit's ruling in this case simply recognizes the medical exclusion of the IDEA. The Sixth Circuit has by no means broadened the scope of the medical exclusion. The Sixth Circuit, as have the majority of other courts, has simply held that the best approach to determine whether a service falls within the medical exclusion of the IDEA is to look directly at the nature and extent of the specific service at issue. By virtue of the fact that the well established majority approach directly examines the particularities of the health service at issue, the Sixth Circuit's ruling in this single case does not have wide sweeping impact on related services.

Petitioners seem to take issue with the IDEA's medical exclusion itself. However, the propriety of the medical exclusion itself is not before this court for review. Without question, the IDEA's medical exclusion limits the extent of medical care a school system must provide in its classrooms. That is the medical

exclusions's very purpose. As this court noted, Congress could well have reasoned that schools could not provide all medical care a child may require. *See Tatro*, 468 U.S. at 892. If petitioners seek to delete the medical exclusion of the IDEA, their proper forum would be through legislative action, not through this proceeding. The IDEA's medical exclusion merely implicitly recognizes that some children unfortunately cannot safely be educated in school due to their severe health conditions. It is for this very reason that accommodations for homebound services are provided for in the IDEA. The Sixth Circuit's decision in this case merely stands for the well-established proposition that the IDEA does not require a school system to provide constant, one-on-one nursing services in the classroom.

## CONCLUSION

For the reasons stated above, the respondent Rutherford County School System respectfully asserts the petition for writ of certiorari should be denied.

Respectfully submitted,

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